

NO. 45772-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

MICHAEL ANTHONY BRUCE, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.13-1-01673-7

BRIEF OF RESPONDENT

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A. **RESPONSE TO ASSIGNMENTS OF ERROR**

- I. THE COURT PROPERLY DENIED THE DEFENDANT'S MOTION TO SEVER.
- II. THE DEFENDANT'S CONVICTIONS FOR BURGLARY IN THE FIRST DEGREE AND RESIDENTIAL BURGLARY VIOLATE DOUBLE JEOPARDY. THE RESIDENTIAL BURGLARY CONVICTION MUST BE REVERSED AND DISMISSED.

B. **STATEMENT OF THE CASE**

Michael Bruce and Heather Reid were in a dating relationship. RP 10. At one point Mr. Bruce lived at Heather's apartment with her for about six months. RP 11. However, the relationship soured and they broke up. RP 11. On the evening of June 29, 2013, Heather, whose two daughters were staying with her aunt in Portland for the night, went to bed between 10:00 and 11:00 p.m. RP 13-15. That evening was very hot, and Heather's apartment lacked air conditioning. RP 14. She opened her windows and the back sliding door, which had a screen on it. RP 14-15. The lock on the screen door was broken. RP 15. As was her custom, she placed her phone on her bedside table. RP 15. Heather awoke to someone touching her arm. RP 15. She heard Mr. Bruce say "Don't be mad," "just be quiet," and "don't yell." RP 15. Heather, however, was upset and began yelling.

RP 16. She tried to get off the bed but Mr. Bruce held her down. RP 16. He held her down by her wrists and placed his body partially over hers. RP 16-17. Heather was yelling at Bruce to leave her apartment. RP 17. Bruce's face was very close to Heather's. RP 17. As she continued to yell, Bruce continued telling her to keep quiet and put his hand over her mouth and nose. RP 18. Heather could not breathe when Bruce did that. RP 18. When she stopped trying to scream and tried to calm herself, Bruce released his hand. RP 18-19.

When he released her face, Heather jumped out of bed. RP 19. At some point she turned the light on and could clearly see it was Mr. Bruce. RP 20. Mr. Bruce was blocking her bedroom door, preventing her from escaping. RP 20. Heather continued yelling and Bruce continued telling her to be quiet and to stop screaming. RP 20. When she would not comply, Bruce punched her in the face. RP 21. Heather began crying and Bruce fled the apartment. RP 21. After Bruce fled, Heather began looking for her phone but could not find it. RP 22. Because there was nothing she could do without her phone, Heather eventually went back to bed. RP 22, 66. She could not fall asleep for an hour. RP 22. Heather did not try to seek help from her neighbors because she was scared and humiliated. RP 23. Heather did not have a car. RP 23.

When she woke the next day, Heather felt horrible and was in pain.

RP 23. Her jaw hurt and her wrist hurt because she had been wearing a bracelet when Mr. Bruce held her down by her wrists. RP 23. She again looked for her phone and worried if Mr. Bruce was still outside. RP 24. She noticed a pot of flowers had been placed on her bathroom sink that had not been there the night before. RP 25. There were several other pots of flowers placed throughout the house that had not been there the night before. RP 33-35. She got dressed and walked to a pay phone and called her mother. RP 25. Heather's mother and her aunt came to her apartment. RP 27. Heather called the police. RP 32.

Deputy Paulson responded to Heather's call. RP 173. He observed bruising on Heather's right wrist and noted that Heather complained of jaw pain. RP 173. She told Deputy Paulson that she and Mr. Bruce had broken up six months ago. RP 179. Heather still had a visible bruise a week after this incident. RP 114.

Heather has a Facebook application on her phone, from which Facebook can be accessed on her profile without having to log in. RP 29. When Heather accessed her Facebook account after the burglary, she found three messages that had been sent to other people using her Facebook account. RP 46. The messages had been sent during the time she did not have access to Facebook through her phone. RP 46. The messages

were sent to four men with whom Heather is friends on Facebook. RP 47. One message said “I told you to stop talking to Heather. I can’t believe you would do this. I thought you were the homie.” RP 48. One of the four men was the man Heather was currently dating. RP 49. All of the messages were of similar content. RP 49.

On September 5, 2013, Heather’s aunt, Linda McCluskey, was babysitting Heather’s daughter while Heather was at work. RP 123. The babysitting took place at Heather’s apartment. RP 123. While entertaining Heather’s younger daughter, Linda heard a knock on the door but elected not to answer it. RP 123. Then the doorbell began ringing incessantly, and Linda relented and answered the door. RP 124. Mr. Bruce was at the door, and Linda told him to leave because he was not supposed to be there. RP 124. Linda informed Mr. Bruce she was calling 911 and he ran away. RP 125. The police came and Linda gave a statement. RP 125.

Later that same evening, Mr. Bruce returned to Heather’s apartment. RP 52. At around 8 p.m. Heather heard a knock on her window, and Bruce’s voice telling her that he needed to talk to her. RP 52. Heather told him to leave. RP 52. At that time Heather’s older daughter came into the room and, upon hearing Mr. Bruce’s voice, began crying. RP 52. Bruce began ringing the doorbell repeatedly, so Heather took the girls to their room. RP 52. Bruce began going around the perimeter of the

apartment, banging on doors and windows. RP 53. Heather called 911. RP 53. Heather and her daughter's hid in the girls' closet trying to stay quiet so Bruce would not know where they were. RP 53. However, when he pounded on the back door, the girls began screaming. RP 53. On the 911 call, Mr. Bruce can be heard in the background demanding to be let in. RP 54. When Deputy Fronk arrived at the apartment he found the defendant at the back of the apartment, well within 250 feet of it. RP 145-46.

Mr. Bruce was restrained from having contact with Heather, or from coming within 250 feet of her apartment, by two separate no contact orders. RP 130-38. The no contact orders were in effect during both the June 29/June 30, 2013, burglary, and the September 5, 2013, apartment scenes. RP 130-38.

Following his arrest, Mr. Bruce sent seven postcards to Heather from the jail, in violation of the orders. RP 167-68, 258.

Heather acknowledged at trial that Mr. Bruce had been at her apartment the night before the burglary, on June 28, 2013. RP 69. He had shown up uninvited that night and she asked him to leave. RP 67-68. Her children were home and it was after 10:00 p.m. RP 67. He told her that if she did not let him in, he would make a scene. RP 68. He persistently begged to be let in, telling her that he had no way of getting home. RP 90. When he threatened to make a scene, Heather feared whatever scene he

had in mind would involve her children. RP 90-91. When asked to describe what type of scene she feared, she replied that she feared a scene similar to the one that occurred on September 5, 2013. RP 91. She let him in. RP 91. He remained at her apartment until the morning, and they fought during that time. RP 69. Mr. Bruce had asked her whether her children would be having swim lessons in Portland, as he was aware that it was her custom to have the girls spend the night with her aunt in Portland the night before swim lessons (which would be the next night). RP 14, 68, 92. She gave him bus money the next morning so he would leave. RP 69.

Heather had not revealed that Mr. Bruce had been at her apartment on June 28, 2013, prior to trial and had denied having contact with him leading up to the June 29/June 30 burglary. RP 93. She did so because she thought she would be in trouble for violating the no contact order, and because she was embarrassed. RP 94. She did not realize at the time of her pre-trial statements that the no contact order was not reciprocal. RP 94-95. For his part, Mr. Bruce denied that he had been at her apartment on June 28, 2013. RP 250.

Mr. Bruce offered an alibi defense through his own testimony and the testimony of his best friend, Doug Schmer, and Doug's wife, Michelle. Doug Schmer testified that he is Bruce's best friend and Bruce was living with him between April and August of 2013. RP 197. He testified that on

June 29, 2013, he and Bruce went to a party in north Portland. RP 201. He testified they left the party for home at about 10:00 p.m. RP 202. He testified that they watched movies at home (he, his wife, and Bruce) until 11:00 p.m. or 12:00 a.m. RP 207. After that Bruce went to bed, taking one of the Schmers young sons with him to bed. RP 209. Mr. Bruce's bedroom was on a different floor than the Schmers' bedroom, which was in the basement. RP 207-08. Doug Schmer admitted that he did not know that June 30, 2013, would be an important day to remember until the first week of September (when Bruce was finally apprehended). RP 211. Doug Schmer admitted that the prosecutor's office had been trying to reach him for the two months preceding the trial in an effort to hear about Bruce's purported alibi. RP 211-12. Schmer testified that the room where the television watching took place was next to Bruce's bedroom on the second floor. RP 209. At trial, Doug Schmer claimed that he stayed at the television until 3:00 or 4:00 a.m. playing video games on his Xbox, but when he was interviewed on the Monday before the trial he said that at 11:00 p.m. he went to the basement with his wife. RP 213. Doug Schmer testified that Mr. Bruce was not allowed to leave his house because Bruce was a recovering addict and needed to be supervised. RP 214.

Michelle Schmer testified that her husband and Bruce returned home on the night of June 29, 2013, at 10:00 p.m. RP 220. She testified

that she turned on the home security system on the night of June 29, 2013. RP 225. However, the questioning on cross examination revealed that she was basing her insistence that she set the alarm that night on the fact that she always set it out of habit. RP 225. Neither Michelle nor Doug Schmer testified that Mr. Bruce did not have the code for the security system. Michelle acknowledged that she had no reason to recall the night of June 29, 2013, or know of its importance, until mid-September, when she learned of the charges pending against Mr. Bruce. RP 225-26. Contrary to her husband's testimony, Michelle testified that she, her husband and Mr. Bruce went to bed at 1:30 a.m. RP 227. She could not remember if her young twin sons were also up that late. RP 227.

When Mr. Bruce was apprehended at Heather's apartment on September 5th, 2013, Deputy Fronk began to question him about his activities on June 29 and 30, 2013. RP 272-73. Bruce made no mention of Doug and Michelle Schmer. RP 273. Bruce also admitted that the moment Deputy Fronk mentioned the dates of June 29 and 30, 2013, Bruce immediately said "I wasn't at Heather Reid's apartment that day," and "I've got an alibi." RP 274-75. Bruce told Deputy Fronk that he was at Cathedral Park (the location of the party) that day. RP 275.

Prior to trial, the State moved to join the misdemeanor no contact order violation charges (of which there were three: one for the first

apartment visit on September 5, 2013, one for the second apartment visit on that date, and one for the post cards) with the burglary in the first degree charge. RP 12-13. In arguing for joinder, the prosecutor also went through the factors which weigh against severance, thereby covering the legal considerations for both principles. RP 15-21. The defendant objected to joinder, making arguments that one would make in moving to sever already joined charges. RP 26-31. Thus, Mr. Bruce should be deemed to have made a motion to sever prior to trial as required by CrR 4.4(a), even though it was technically an opposition to joinder. The severance factors were fully briefed and argued by the parties. RP 15-31.

The trial court granted the State's motion to join, finding that the acts are of the same or similar character and that there is "substantial overlap" between the offenses. RP 32. Starting with the presumption that joinder was then appropriate, the court moved on to the prejudice analysis from the severance line of cases. RP 32-34. The court analyzed the motion using the four severance factors and found that the acts in question encompassed a course of conduct. RP 34. The court found that the nature of the charges was not particularly complex, that the jury could clearly parse out the differing defenses being offered (alibi and admission), that it would instruct the jury to decide each count separately, and that the

evidence in each charge was cross admissible because this was a course of conduct in a domestic violence context. RP 33-34.

During the State's case-in-chief, Mr. Bruce renewed his motion to sever. RP 128. He argued that because of Heather's testimony "where she indicated that [the defendant's] pattern of behavior on June 30th was the same as his behavior on September 30th...that does create a situation where the trial court would be justified in severing those counts to avoid a chance that the jury may decide guilt on the September 5th incident based on the testimony about the June 30th incident." RP 128. The State noted that it was Mr. Bruce who opened the door to that line of questioning in Heather's testimony, and that the jury had already heard about the September 5th incident when Heather made the remark about the scene she feared on June 28, 2013, (the night he stayed at her apartment) being the type of scene that ultimately occurred on September 5th. RP 128-29. The court denied the motion, noting there was nothing new on which to grant the motion and that Mr. Bruce had, in fact, opened the door to the line of questioning that led Heather to compare the scene she feared on June 28th with the scene that ultimately occurred on June 30th. RP 129.

The jury found the defendant guilty of, inter alia, burglary in the first degree, felony violation of no contact order (for assaulting Heather in violation of a no contact order), residential burglary, and the three

misdemeanor no contact order violations. CP 170-77, RP 344-45. These are the convictions at issue in this appeal. This timely appeal followed.

C. **ARGUMENT**

I. **THE COURT PROPERLY DENIED THE DEFENDANT'S MOTION TO SEVER.**

Mr. Bruce objected to joinder prior to trial and renewed his severance request at trial and before the close of the State's case. The issue is preserved. However, the trial court properly denied the motion to sever.

Bruce alleges the trial court's denial of his motion to sever denied him a fair trial. However, the trial court properly weighed the appropriate factors when considering whether any counts should be severed for trial, and did not abuse its discretion when it found that continued joinder was appropriate. Bruce has not shown the trial court abused its discretion in denying his motion to sever.

Court Rules provide that two or more offenses may be joined in one charging document if the charges are of same or similar character or are based on the same conduct or a series of acts connected together or constituting parts of a single scheme or plan. CrR 4.3(a). Washington is a liberal joinder state, and failure to properly join cases for trial wastes

judicial resources. *State v. Thompson*, 88 Wn.2d 518, 525, 564 P.2d 315 (1977), overruled on other grounds by *State v. Thorton*, 119 Wn.2d 578, 835 P.2d 216 (1992); *State v. Wilson*, 71 Wn.App. 880, 886, 863 P.2d 116 (1993), *rev'd in part on other grounds*, 125 Wn.2d 212 (1994). Separate trials are not favored and courts should view consolidation for trial expansively to promote the public policy of conserving judicial and prosecutorial resources. *State v. Grisby*, 97 Wn.2d 493, 506-07, 647 P.2d 6, 25 (1982), *cert. denied*, 103 S. Ct. 1205, 459 U.S. 1211, 75 L.Ed.2d 446 (1983); *State v. Bryant*, 89 Wn.App. 857, 865, 950 P.2d 1004 (1998), *rev. denied*, 137 Wn.2d 1017 (1999). A trial court should sever charges for trial if the trial court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense. CrR 4.4(b); *State v. Bythrow*, 114 Wn.2d 713, 717, 790 P.2d 154 (1990). Whether to sever offenses is within the sound discretion of the trial court, and will only be reversed upon a showing of manifest abuse of discretion. *Id.* The defendant has the burden of demonstrating that joinder of offenses would be so manifestly prejudicial so as to outweigh the concerns for judicial economy. *Id.* at 718.

On appellate review, this Court should review the trial court's consideration of the relevant factors in determining Bruce's motion to sever. A court should consider the strength of the State's evidence on each

count; the clarity of defenses as to each count, the court's instructions or ability to instruct the jury to consider each count separately; and the cross-admissibility of the evidence. *State v. Russell*, 125 Wn.2d 24, 62-68, 882 P.2d 747 (1994). The presence of these four factors tends to mitigate any prejudice from joinder. In *State v. Hentz*, 32 Wn.App. 186, 647 P.2d 39 (1982), *rev'd in part on other grounds*, 99 Wn.2d 538, 663 P.2d 476 (1983), this Court found in a case where the defendant alleged error in the trial court's refusal to sever counts, that bare assertions that a joint trial of offenses will create a danger that the jury will accumulate evidence, or that the defendant may be embarrassed in presenting conflicting defenses, or that the jury may conclude the defendant has a propensity for crime do not satisfy the defendant's burden of demonstrating that there is substantial prejudice by the joinder of offenses when his jury was instructed to decide each count separately. *Hentz*, 32 Wn.App. at 190.

Here, the trial court properly denied severance. The first factor weighs in favor of joinder. The concern under this first factor is that the jury will use strong evidence on one count to bootstrap weak evidence on another. This factor overlaps with the second prejudice factor in the

joinder analysis. See *State v. Huynh*, 175 Wn.App. 896, 908, 307 P.3d 788 (2013).¹ The strength of the State's evidence on each count was very strong, contrary to Bruce's assertions. As to the gross misdemeanor no contact order violations, Bruce admitted his guilt on those counts. As to the burglary in the first degree and felony violation of a no contact order counts, the evidence was clear and very strong. Bruce knew that Heather's children would be absent from the home on the night of June 29, 2013. When she awoke to a man speaking to her, she recognized Bruce's voice and knew it was him. Later, when the lights were turned on, she could clearly see it was him. She had visible injuries supporting her account of having been held down by her wrists. Her phone was, in fact, stolen, and Facebook messages that were clearly from Mr. Bruce were sent to several of her male Facebook friends, including the man she was currently dating. The messages expressed anger at those men for having been in contact with Heather. Heather gave sensical explanations for her behavior in not seeking help that night, including her lack of a phone and car, and her embarrassment at what had happened. She also feared Mr. Bruce, not knowing where he fled. Finally, Heather had absolutely no reason to invent this story, which would have included her staging a scene wherein

¹ *State v. Huynh* is one of several cases that conflates the three joinder factors with the four severance factors. While there is substantial overlap in principle between the factors, they are different.

flowers were left in various vases and pots all throughout her apartment and someone (not Mr. Bruce) stole her phone and sent angry messages to several of her male friends. Heather also gave a plausible explanation for why she allowed Bruce into her apartment the night before the burglary (she was scared of him and worried he would make a scene) and for why she failed to timely disclose it (she was embarrassed and feared she would get in trouble because of the no contact order). That the jury found Heather credible despite these missteps on her part does not weigh in favor of severance.

In moving to sever during trial, defense counsel argued that severance should be granted because the jury may infer “guilt on the September 5th incident based on the testimony about the June 30th incident.” RP 128. In other words, defense counsel was concerned that the strong evidence presented on the June 30th incident would be used by the jury to support a finding of guilt on the September 5th charges. This makes no sense. Mr. Bruce admitted his guilt to the September 5th charges. The evidence, therefore, foreclosed the possibility of acquittal on the September 5th charges. Defense counsel’s concern that joinder of the charges would lead to an unfair determination by the jury as to the defendant’s guilt on the September 5th charges was meritless. The trial court properly weighed this factor against severance.

As to the second factor, the defenses as to each count were clear and not irreconcilable. Each count was supported by clear and easily understandable evidence. Mr. Bruce tactically chose to admit to those crimes for which he was caught red-handed: the gross misdemeanor no contact order violations. His admission to those crimes did not negate his defense of alibi to the burglary. He was not impaired in presenting that defense in any way. Indeed, he presented two witnesses who supported his alibi defense. That the jury found him and his witnesses not credible, and rejected the clearly fabricated claim of alibi, does not weigh in favor of severance or suggest that the defenses were confusing or lacked clarity. Bruce relies on the oft-cited passage from *Russell*, supra, in which the Court said “it isn’t as though there will be a self-defense argument on one and a different type of defense on another one, or that there will be an admission of one or a denial of another.” *Russell* at 65. But this passage is dicta. It is true that in *Russell*, the Court noted that where the defenses on multiple counts are identical, the likelihood the jury will be confused is “very small.” *Russell* at 64. This, however, does not mean that defenses *must* be identical for joinder to be proper. The trial court did not abuse its discretion in finding that the defenses to each charge were sufficiently clear as to weigh against severance.

As to the third factor, the court instructed the jury that its verdict on one count should not influence its verdict on any other count; that it should decide each count separately. CP 134. This factor weighs against severance.

As to the fourth and final factor, the evidence on each count was cross-admissible. These offenses were intricately related and were part of an ongoing pattern and course of conduct. Mr. Bruce was restrained by a no contact order during each incident. The existence of the order explained why Heather initially misrepresented how long it had been since she had seen Mr. Bruce prior to the June 29/June 30th burglary. She was afraid she also would be in trouble for violating the order. Mr. Bruce's frightening behavior on September 5th showed a common scheme on his part of showing up at Heather's apartment unannounced and uninvited and behaving threateningly, if not violently, while seeking entry or after gaining entry. Finally, Heather's reference to Bruce's behavior on September 5th in explaining why she let him in to her apartment back on June 28th was neither improper nor unduly prejudicial. She was merely using his behavior on September 5th as a descriptive tool to describe what she feared would happen on June 28th--thus explaining why she let him in that night. Finally, the offenses were separated by a relatively short period of time, during which Mr. Bruce remained at large.

A trial court abuses its discretion if its decision is manifestly unreasonable or is based upon untenable grounds or untenable reasons. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). The trial court did not deny Bruce's motion to sever for an untenable reason, or based upon untenable grounds. Upon an application of the facts of the case to the law, it is clear the trial court's decision was not unreasonable, let alone manifestly unreasonable. Bruce has not demonstrated that the trial court abused its broad discretion in hearing this motion, given that our joinder rules are broad and the *Russell* factors favored joinder here. Bruce's assertion that the trial court abused its discretion is without merit. The trial court should be affirmed.

II. THE DEFENDANT'S CONVICTIONS FOR BURGLARY IN THE FIRST DEGREE AND RESIDENTIAL BURGLARY VIOLATE DOUBLE JEOPARDY. THE RESIDENTIAL BURGLARY CONVICTION MUST BE REVERSED AND DISMISSED.

Mr. Bruce was convicted of both residential burglary and burglary in the first degree based on his singular entry into Heather's apartment on June 30, 2013. He argues that these convictions violate double jeopardy. Bruce is correct. Where only one unlawful entry was shown, there cannot be two separate convictions for burglary. The State concedes this error.

Mr. Bruce's conviction for residential burglary must be reversed and dismissed.

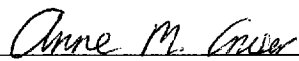
D. **CONCLUSION**

The trial court properly denied Mr. Bruce's motion to sever the counts. The residential burglary conviction must be reversed and dismissed.

DATED this 17th day of October, 2014.

Respectfully submitted:

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